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No. 82-1222

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ILLINOIS, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the proper standard in denying petitioners' request for an interlocutory injunction pending review of the Interstate Commerce Commission's decision to permit abandonment of a rail line.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-4a) and the opinions of the Interstate Commerce Commission (Pet. App. 7a-22a, 23a-25a, 26a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 4a) denying petitioners' motion for an interlocutory injunction was entered on September 21, 1982. A petition for rehearing (Pet. App. 5a) was denied on December 6, 1982. The petition for a writ of certiorari was filed on January 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Illinois Central Gulf Railroad Company (ICG) filed an application with the Interstate Commerce Commission for authority to abandon approximately 31 miles of rail line in Illinois. The Commission granted the application, noting that ICG had lost large sums of money from operations on the line due to declining traffic, that ICG would have to spend a large sum to rehabilitate the line, that the abandonment would not have a significant adverse effect on shippers, and that there is alternative transportation available in the area (Pet. App. 10a-14a, 18a). The Commission declined to hear administrative appeals from its decision (*id.* at 23a-25a), and petitioners sought review in the court of appeals.

Petitioners requested that the Commission stay the authorization to abandon the line pending judicial review, but the Commission denied that request (Pet. App. 26a-29a). The court of appeals also denied petitioners' subsequent requests for an interlocutory injunction against issuance of the authorization of abandonment (*id.* at 3a-4a) and for rehearing (*id.* at 5a-6a). The court stated that petitioners had failed to satisfy the standards for an interlocutory injunction set forth in *Adams* v. *Walker*, 488 F.2d 1064 (7th Cir. 1973), and *Ciechon* v. *City of Chicago*, 634 F.2d 1055 (7th Cir. 1980) (Pet. App. 2a, 6a). ICG discontinued operations over the line in August 1982 (Pet. App. 2a).

ARGUMENT

1. Petitioners contend (Pet. 7-10) that the court of appeals applied the wrong standard in denying their application for a preliminary injunction and that the decisions upon which the court relied are inconsistent with *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Petitioners' contentions are without merit.

To obtain a stay, a moving party must make the four-part showing first enunciated in *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Under that test, the movant must show (1) that there is a strong likelihood that it will prevail on the merits; (2) that it will suffer irreparable harm if the stay is not granted; (3) that other parties will not be harmed substantially by a stay; and (4) that the public interest supports the granting of the requested relief. Whether to stay an administrative agency action is an exercise of judicial discretion even where irreparable injury is shown. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 10-11 (1942). Thus, the propriety of a stay is dependent upon the facts and circumstances of each case. *Ibid.*; *Yakus* v. *United States*, 321 U.S. 414 (1944).

The court of appeals relied upon its own precedents—namely, *Adams* v. *Walker*, 488 F.2d 1064 (7th Cir. 1973), and *Ciechon* v. *City of Chicago*, 634 F.2d 1055 (7th Cir. 1980)—in denying petitioners' motion for an interlocutory injunction and their petition for rehearing. These cases, which, as petitioners acknowledge (Pet. 10), follow *Virginia Petroleum Jobbers*, are consistent with *Holiday Tours*. In *Holiday Tours*, the court found that "a substantial case on the merits" rather than "a mathematical probability" of success may suffice for issuance of a preliminary injunction when all the other relevant factors weigh heavily in favor of the movant (559 F.2d at 843). The court stated (*ibid.*):

> [W]e hold that under *Virginia Petroleum Jobbers* a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a

> mathematical probability and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

Contrary to petitioners' contention, *Holiday Tours* did not abandon the *Virginia Petroleum Jobbers* standard but merely explained the proper application of that test in those instances in which the balance of equities strongly favors a stay. In subsequent cases, the same court has repeatedly reaffirmed its adherence to *Virginia Petroleum Jobbers*. See, *e.g.*, *Ambach* v. *Bell*, 686 F.2d 974, 975 (D.C. Cir. 1982); *National Ass'n of Farmworkers* v. *Marshall*, 628 F.2d 604, 613 (D.C. Cir. 1980); *In re Permanent Surface Mining Regulation Litigation*, 617 F.2d 807 (D.C. Cir. 1980).

In any event, petitioners here not only failed to show "a mathematical probability" of success but, as the Commission found (Pet. App. 26a-29a), also failed to establish "a substantial case on the merits." The denial of a preliminary injunction was, therefore, clearly appropriate. Further, petitioners failed to demonstrate that the other factors weighed strongly in favor of a preliminary injunction, so that relief would in any event have been inappropriate under *Holiday Tours*.

2. Petitioners also contend (Pet. 11-13) that permitting the abandonment to occur in this case will preclude meaningful judicial review. This argument is grounded upon generalizations and not the particular facts and circumstances of this case.[1]

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[1]Petitioners rely on *Baltimore & O.R.R.* v. *United States*, 386 U.S. 372 (1967), for the proposition that denial of a preliminary injunction terminates judicial review as a practical matter. In *Baltimore & O.R.R.*

For example, petitioners argue (Pet. 11; emphasis added) that an abandonment is "*normally* * * * irreversible." But they do not dispute the fact that here the Commission may order reinstitution of service if necessary, since the track and roadbed are being preserved pending judicial review (Pet. App. 2a). Petitioners contend (Pet. 12) that preservation of the roadbed and track will not maintain the status quo because the cessation of service will have an adverse effect on shippers and communities previously served by the line. Petitioners overlook the Commission's finding (Pet. App. 13a-14a) that such adverse effects will be minimal because of the availability of alternative forms of transportation. In addition, petitioners have failed to demonstrate that any adverse effects could not be remedied by reinstitution of service if they prevail in their petition for review.[2]

Petitioners assert (Pet. 12) that denial of a stay pending appeal means that in all likelihood the case will be voluntarily dismissed. Petitioners' prediction that they themselves will voluntarily abandon their petition for review if they do

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the Court reversed the denial of an interlocutory injunction against a large railroad merger and held that the ICC had erred in permitting consummation of the merger without awaiting the determination of proceedings concerning certain railroads that would be affected. In that case, unlike this one, therefore, the question was whether the Commission's decision should await the disposition of on-going proceedings. Further, undoing a complex railroad merger is not comparable to the problem of resuming service on a line the roadbed and track of which have been maintained.

[2]Petitioners rely (Pet. 12) upon *ICC* v. *Maine Central R.R.*, 505 F.2d 590 (2d Cir. 1974), and *ICC* v. *Chicago, R.I. & P.R.R.*, 501 F.2d 908 (8th Cir. 1974), cert. denied, 420 U.S. 972 (1975), for the sweeping proposition that "abandonment of service should be subject to immediate injunctive action because of the adverse effect upon shippers and communities" (Pet. 12). However, those cases concerned illegal abandonments carried out without the Commission's authorization.

not have their way in this proceeding is not, we submit, a persuasive reason for issuing a stay or injunction pending judicial review.[3]

Petitioners argue (Pet. 12) that they have no remedy other than injunctive relief because they are not entitled to damages. This argument is irrelevant because the decision below merely denied an interlocutory, not a permanent, injunction. Finally, petitioners maintain (*id.* at 12) that preservation of roadbed and track "may not prevent the reverter of land." But they fail to show that this is likely to occur here.

If petitioners' arguments were accepted, the courts of appeals would have to stay all abandonments pending judicial review, regardless of the degree of injury. Such a rigid requirement would be inconsistent with the well-settled rule that a party is not ordinarily granted a stay without a showing of irreparable injury. *Permian Basin Area Rate Cases*, 390 U.S. 747, 773 (1968). Moreover, petitioners' position is at odds with the broad judicial discretion inherent in the decision whether to grant equitable relief. *Id.* at 773-774.

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[3]Furthermore, in cases such as this, a stay is not always a necessary incentive for prosecuting of an appeal. For example, petitioners acknowledge (Pet. 12) two abandonment cases in which briefs were filed even though a stay was denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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